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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5601

CARLOS RIVERA GOMEZ,

Petitioner,

—v.—

ASTOL CALERO TOLEDO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

LEON FRIEDMAN
Hofstra University
School of Law
Hempstead, N.Y. 11550

CHARLES S. SIMS
BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016

Attorneys for Amicus Curiae

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CARLOS RIVERA GOMEZ,
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ASTOL CALERO TOLEDO,
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On Writ of Certiorari to the
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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members. It exists solely for the purpose of protecting the civil rights and liberties of Americans. Since 1920, one of its constant concerns has been the need to provide adequate legal mechanisms to protect

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* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

against, and remedy, violations of constitutionally protected rights.

Amicus has frequently appeared before this Court in support of the historic role of 42 U.S.C. §1983 in remedying violations of federal civil rights, and in deterring departure from constitutional standards. We submit this brief amicus curiae to urge the Court to preserve the role of §1983 in enforcing fidelity to the constitutional obligations of state officials entrusted with public power.

STATEMENT OF THE CASE

This action was commenced in the District of Puerto Rico based on petitioner's complaint that he was improperly discharged from employment as a police officer. Jurisdiction of the District Court was invoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331.

According to the complaint, whose allegations must be accepted as true, petitioner had been employed since 1968 as a police officer with the Police Department of the Commonwealth of Puerto Rico. In the course of his work he discovered that two other police officers had obtained false evidence and used it in a pending prosecution. When he reported this to his superior officer he was transferred from his normal duties and assigned to the Police Academy. He was later exonerated by the Legal Division of the Police Department, which corroborated his accustions.

Subsequently petitioner was subpoenaed by the defense lawyer in the criminal case in which the false evidence had been given. He testified in that case in accordance with the facts as he knew them. Thereafter, and as a result of his court testimony, the Superintendent of Police of the Commonwealth of Puerto

Rico, respondent herein, filed criminal charges against petitioner for wiretapping, claiming petitioner had made his discoveries through an illegal wiretap. The criminal charges were later dismissed as lacking probable cause, and petitioner has alleged that respondent knew when he instituted them that the wiretap statute could not properly be applied to the conduct in question.

In addition to the criminal charges, petitioner was suspended and discharged, allegedly for contesting the honesty, integrity and competence of the other officers. The discharge took place without a hearing despite the fact that a Commonwealth statute gave police officers the right to an administrative hearing before imposition of disciplinary action.

In July 1977, petitioner instituted this civil rights action, alleging the facts set forth above and claiming that his substantive and procedural rights to due process of law had been violated. He also charged that the discharge was in retaliation for his testimony in the criminal case.

The complaint was dismissed by the District Court on October 23, 1978, on the ground that petitioner had not met his affirmative

obligation to allege and prove that respondent acted in bad faith. That decision was affirmed by the First Circuit, 602 F.2d 1018, 1020: "Where, as here, a public official is being sued for action taken in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith and state why in this particular case the cloak was shed." The Court rejected petitioner's argument that his complaint sufficiently alleged bad faith by allegations that the respondent had knowingly deprived him of rights specifically guaranteed by Puerto Rican law.

SUMMARY OF ARGUMENT

It is the nearly universal judgement of the Courts of Appeals, and implicit in this Court's decisions in Pierson v. Ray, 386 U.S. 547 (1967), Wood v. Strickland, 420 U.S. 308 (1975), and Butz v. Economou, 438 U.S. 478 (1976), that the good faith defense is a true affirmative defense, to be pleaded and proven by the defendant. Point A.

Some §1983 actions require plaintiffs to prove a particular state of mind on the part of defendant involving the issue of intent, because the constitutional right is defined as the right to be free from governmental action with a particular type of intent. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976); Washington v. Davis, 426 U.S. 229 (1976). Point B. But the good faith defense involves a very different state of mind issue. It presents not a question of willfulness or intent to commit the act, but rather the question whether the state actor had a good-faith, reasonable belief in the lawfulness of his actions. Wood v. Strickland, 420 U.S. 308 (1975). As is shown by the irrelevance of the good faith defense to suits for declaratory or equitable relief, proof of lack of "good faith" is not part of plaintiff's §1983 cause of action. Moreover, the requisite "good faith belief" in the lawfulness of one's actions may arise from a myriad of possible factors - a prior legal opinion, a recent Court decision, conversation with counsel, long-established and unchallenged administrative practice - and the defendant, not the plaintiff, is in the best position to know which

particular facts assertedly support his defense. Accordingly, because only he can effectively do so, it is appropriate to require the defendant to plead and prove the good faith defense. Point C.

Finally, in other areas of the law where good faith bars the imposition of retrospective liability, Congress and the courts have imposed on defendants the burden of pleading and proving good faith, recognizing that defendants are in the best position to adduce the facts supporting a good faith defense. Point D.

ARGUMENT

THE NATURE AND PURPOSE OF THE GOOD FAITH DEFENSE REQUIRE THAT DEFENDANT HAVE THE BURDEN OF ALLEGING AND PROVING IT.

A. The Court Below Misunderstood the Rationale of the Good Faith Defense.

The First Circuit decision is an anomaly. With only one rather confusing exception,[1] every other Circuit has held that the good faith defense is an affirmative defense which must be pleaded and proven by the defendant.[2]

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[1] In Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1979), the Fifth Circuit stated that although lower government officials must plead and prove their good faith, the "director of a statewide prison system" may not have that burden. The court then held that regardless of whose burden it was, the plaintiff's proof did show bad faith. The statements on the burden of proof were therefore dictum.

[2] See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972); Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53, 61-62 (3d Cir. 1976) (en banc); McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), cert. granted and later dismissed on other grounds as improvidently granted, 426 U.S. 471 (1976); Bryan v. Jones, 530 F.2d 1210, 1213 (5th Cir. 1976) (en banc); Glasson v. City of Louisville, 518 F.2d 899, 907-910 (6th Cir. 1975), cert. denied 423 U.S. 930;

(footnote continued on next page)

Although this Court has not spoken directly to the issue, its comments in Section 1983 and Bivens cases indicate that it believes that pleading and proving the good faith defense is the defendant's burden. Thus in Pierson v. Ray, 386 U.S. 547, 556, 557 (1967), Chief Justice Warren, joined by all members of the Court except Justice Douglas, wrote:

> The police officers [in Monroe v. Pape, 365 U.S. 167(1961)] did not go to trial and defend the case on the hope that they could convince a jury that they believed in good faith that it was their duty to assault Monroe and his family in this manner...We also held that the complaint [in Monroe] should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers...Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause. (Emphasis added.)

(footnote continued from preceding page)

Tristis v. Backer, 501 F.2d 1021, 1022 (7th Cir. 1974); Landrum v. Moats, 576 F.2d 1320, 1329 (8th Cir. 1978); Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978); Martin v. Duffie, 463 F.2d 464, 468 (10th Cir. 1972); Dellums v. Powell, 566 F.2d 167, 176 (D.C. Cir. 1977), cert. denied 438 U.S. 916.

More recently, in Butz v. Economou, 438 U.S. 478, 508 & n.35 (1978), this Court referred to the "defense of immunity," which could be raised by a defendant on a motion for summary judgement. It also noted that: "The defendant official may also be able to assert some other common-law or constitutional privilege." This language is inconsistent with the decision below that the plaintiff must allege and prove the defendant's bad faith in a constitutional tort action.

The First Circuit's adoption of this anomalous rule was based in part on its misunderstanding of the good faith defense. Thus, the court below confused the various mental components in a Section 1983 case, holding:

> Public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. Or to put it conversely, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessly. (Emphasis added.)

602 F.2d at 1020. This statement is simply wrong. It misstates the subjective portion of the good faith defense because the good faith defense protects a government official who

reasonably believes his actions were lawful, not necessary. The distinction is crucial. An army officer may believe it necessary to kill all the civilians in a war zone. But if he knows or should have known that such actions are unlawful, he has no defense. See United States v. Calley, 22 U.S.C.M.A. 534 (1973). A college president may have thought it necessary to fire the student editors of a newspaper because of their articles. But he has no defense to §1983 action unless he shows he believed he could lawfully do so. See Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975). The First Circuit's holding also wholly ignores the objective component of the good faith test: Was the defendant's belief in the legality of his actions reasonable under the circumstances? See Wood v. Strickland, 420 U.S. 308, 322 (1975). And it incorrectly equates "bad faith" with "malice," rather than with the absence of good faith.

The rather succinct manner in which the court below presented the test also confused those mental elements which a plaintiff must sometimes prove in order to show a constitutional violation, with mental elements which

are properly characterized as part of a defense. It is necessary to separate those elements in order to show the First Circuit's error.

B. Under Certain Circumstances, the Plaintiff Must Prove a Particular Intent on the Part of the Defendant Official to Succeed in a Section 1983 Action.

In any Section 1983 action, the plaintiff must prove the official acted under color of state law and caused an injury to his constitutional or federal rights. The plaintiff is not required to show an intent to deprive him of a specific constitutional right, but he must prove the defendant had the intent to do an act that a reasonable person would foresee would threaten a constitutional right of the plaintiff. See generally Monroe v. Pape, 365 U.S. 167, 187 (1961); Kirkpatrick, "Defining a Constitutional Tort Under Section 1983: The State of Mind Requirement," 46 U. of Cinn. L. Rev. 45 (1977). In addition, depending on the right allegedly violated, the plaintiff may have to prove that the defendant acted with a particular type of intent as part of the

proof necessary to show violation of a constitutional right. Thus, if a Fourth Amendment-false arrest or false imprisonment claim is made, the plaintiff must ordinarily prove that there was an intent to arrest or an intent to imprison. See, e.g., Bryan v. Jones, 530 F.2d 1210 (5th Cir. 1976) (en banc); Restatement of Torts, Second, §35 ("An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other....") (Emphasis added.) If a due process, malicious prosecution claim is made, the plaintiff must prove the defendant's intent to prosecute maliciously. Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979), petition for cert. pending, No. 79-912, 48 U.S.L.W. 3414. See also Kimbrough v. O'Neal, 545 F.2d 1059, 1061 (7th Cir. 1976) (due process claim that property was taken requires proof that government official took it intentionally or with reckless disregard). See generally L. Friedman, "The Good Faith Defense in Constitutional Litigation," 5 Hofstra L. Rev. 501, 507 n.54 (1977). This proof is analogous to the proof that tort plaintiffs must submit in a variety of intentional tort actions.

In these cases, the constitutional right at issue is defined in terms of the right to

be free from action by a government official associated with a particular type of intent. Thus the Eighth Amendment right to be free of cruel and unusual punishment has been defined as the right to be free from conduct of a state official acting with particular malice, recklessness or indifference. In Estelle v. Gamble, 429 U.S. 97 (1976), this Court held that unless a plaintiff prisoner can show "deliberate indifference to serious medical needs," on the part of prison officials, no constitutional violation has occurred. Thus the plaintiff must show more than an intent to do the acts that led to medical problems. Unless he proves "deliberate indifference," he has failed to prove any constitutional injury.

Similarly, in Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), this Court held that a plaintiff must prove discriminatory intent on the part of the government official being sued in a Fourteenth Amendment - equal protection action. This Court concluded that the Fourteenth Amendment was not violated unless the action of the official was associated with and motivated by a particular animus or intent. Unless proof of that

intent was submitted by the plaintiff, no constitutional right was implicated and a Section 1983 case must fail. Thus once again, the right is defined in terms of the right to be free of certain action associated with a particular intent.

On the other hand, there are times when no intent must be proven by the plaintiff. Thus this Court held in Baker v. McCollan, 61 L. Ed. 2d 433, 439 (1979), that there is no blanket rule on whether allegation and proof of simple negligence can support a Section 1983 action. "It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action." Implicitly, there are some actions in which proof of intentional action is not necessary for a plaintiff to prevail, and therefore no need for him to show intent.

Conversely, there are instances where proof of the most malicious state of mind by a state officer will not help a plaintiff if his constitutional rights are not affected. Thus in Paul v. Davis, 424 U.S. 693 (1976), this Court held that a person's reputation as such was not protected by the Constitution, and presumably

even a malicious defamation by a state officer would not support a Section 1983 action. Similarly, in Baker v. McCollan, supra, this Court held that the state of mind of the sheriff was wholly immaterial since no constitutional right of the plaintiff - arrested under a facially valid arrest warrant - had been violated.

These principles do not deal with or focus on the good faith defense. They relate to volitional elements of the human mind, the intent or willfulness with which an act is done. Since tort law, the background against which §1983 must be read, has often made the intent with which an act is done relevant to liability, it is not surprising that the law makes the plaintiff shoulder the burden of proving that intent. In the same way that a tort plaintiff must prove that the defendant engaged in actions giving rise to injury and that his actions were the proximate cause of the injury, he must also in some cases prove the intent of the actor as well. He knows the actions at issue. He must also present proof of intent associated with those same actions where that is relevant. He may be aided by certain presumptions in making such proof, see Monroe v. Pape, supra, 365 U.S. at 187, but the burden is nevertheless his to meet.

C. The Good Faith Defense Involves Different Policy Considerations and a Different State of Mind Component, Generally Not Within the Knowledge of Plaintiff, and it Would Be Unfair to Impose the Burden Upon Him to Prove Its Opposite.

The good faith defense, as developed by this Court in Scheuer v. Rhodes, 416 U.S. 232 (1974), Wood v. Strickland, 420 U.S. 308 (1975), O'Connor v. Donaldson, 422 U.S. 563 (1975), and Procunier v. Navarette, 434 U.S. 555 (1978), involves totally different elements and considerations than the intent requirements outlined above. The issue in the area of good faith is always the defendant's awareness of the legality of what he is doing. As this Court wrote in Wood v. Strickland, 420 U.S. at 321, the official must be acting sincerely "and with a belief that he is doing right," that is, legally. This Court emphasized that a government official will be held liable if he knew or should have known that "the action he took within his sphere of official responsibility would violate the constitutional rights of the [citizen] affected." Id. at 322.

In Procunier v. Navarette, supra, this Court found that the right of prisoners to have their mail protected against official interference

was not clearly established in the period before 1972 when the actions at issue occurred. Thus, because the defendant prison officials "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith.'" 434 U.S. at 565.

The theory of the good faith defense is that a government official should not have to answer in damages when he was acting sincerely (with no intent to cause injury) and with a reasonable belief in the legality of what he was doing, even if he had violated the constitutional rights of a citizen. By definition, the good faith defense does not come into play until the plaintiff has proved a constitutional violation and injury to himself. At that point, as between the citizen who was injured and the government official who acted sincerely and with a reasonable belief in the legality of what he was doing, the citizen must bear the injury without compensation. Imposing liability for damages "for every action which if found subsequently to have been violative of a student's constitutional rights and to have

caused compensible injury would unfairly impose" on state officers. It would lead to "intimidation" and would "deter even the most conscientious" decisionmaker from exercising his judgement. Wood v. Strickland, 420 U.S. at 319-320. But the immunity granted is qualified, and available only if the acts were both sincerely motivated (with no malicious intent to injure) and based on a reasonable view of their legality.

It follows that a good faith defense cannot be a defense to a suit for injunctive or declaratory relief. As noted above, the good faith defense comes into play only after a constitutional violation has been found. The defense itself is a personal one to insure that government officials are not immobilized by their concern about later damage suits. But if only injunctive relief is sought, that balancing need not occur, and a court should and must order that the constitutional violation stop. It has been the universal view of the lower federal courts that good faith does not bar an injunction, once a constitutional violation has occurred. See National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974): "A good faith defense

in a suit for damages brought against a federal official as an individual is seemingly established by Bivens v. Six Unknown Agents...but that defense is not assertable in the face of a quest limited to injunctive, declaratory, or mandamus relief." See also Chinese for Affirmative Action v. Leguennec, 580 F.2d 1006, 1008 (9th Cir. 1978); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975).

These principles of the good faith defense show that the burden of proving good faith must always rest on the defendant official. It is not part of the plaintiff's proof of a constitutional violation, or it would be relevant in actions for prospective relief. It is an affirmative personal defense based upon considerations of balancing the need for vigorous action by public officials against the desire to compensate injury to a citizen by the official's actions. The purpose of the good faith defense requires, once the plaintiff has shown a constitutional violation has occurred, that the official then show the policies justifying the good faith defense apply in his case. He is the one who is conscious of his own reasons for acting and his belief in the legality of

those actions. Requiring a plaintiff to prove that mental state and knowledge as part of his case in chief is unfair, unnecessary and inconsistent with the theory of the good faith defense.

There is another reason for placing the burden of alleging and proving good faith on the official. When good faith is involved, the question is not what the actor's intent was when he committed the acts in question, but whether he had a reasonable belief in the legality of what he was doing. The calculations that enter into an official's belief in the legality of what he is doing are peculiarly within his own knowledge and control, and conversely are generally not available or accessible to the plaintiff. An official may believe that he is acting legally because of the advice of counsel, Adler v. Lynch, 415 F.Supp. 705, 714 (D.Neb.1976), Johnscn v. Anderson, 420 F. Supp. 845, 850 (D. Del. 1976). The official may have been relying on a long-established administrative regulation, see Mukmuk v. Commissioner of the Department of Correctional Services, 529 F.2d 272 (2d Cir. 1976), cert. denied 426 U.S. 911; Walker v. Hoffman, 583 F.2d 1073, 1075 (9th Cir. 1978)

("...forestry officers submitted affidavits and supporting documents which demonstrate that they followed normal procedures in terminating the appellant's occupancy of the claim site."). In Wolfel v. Sanborn, 555 F.2d 583, 589 (6th Cir. 1977), the Sixth Circuit held that a parole officer might rely on an "unwritten policy of the Parole Authority" to show his belief in the legality of his actions and thus his good faith. An official may receive an opinion from the State Attorney General to justify his actions. See Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978) ("...Robinson checked with the State Attorney General's Office and was told he could remove the color television and oak table.").

Each one of these areas involves mental conclusions based on facts or events outside the knowledge of the plaintiff. If a defendant official is going to rely on an administrative regulation, an "unwritten policy," or an opinion of the Attorney General, then the defendant must affirmatively plead and prove their existence. A plaintiff who has shown a constitutional violation has no way of knowing on what basis a government official

may believe his acts were legal. A plaintiff cannot be expected to discover, before he brings his law suit, on what rule or regulation or opinion or previous conversation a defendant might rely. These are matters within the knowledge of the official and are generally separate from the acts that gave rise to the injury in question. As with any affirmative defense, these are matters which the defendant must introduce into the proceedings as a justification for his acts, because as a practical matter he is in the best position to adduce the relevant facts.

In the instant case, the defendant police chief may believe that particular rules or regulations provided a reasonable basis for his belief that his action did not violate petitioner's constitutional rights. He may have received an opinion of the Attorney General or some other government official. He may have been confused about the facts and may have the equivalent of a "mistake of fact" defense, if his belief was reasonable. But it would be unfair in the extreme to ask a plaintiff to guess at what the defendant relied upon, to anticipate all the possible defenses in this area, and to affirmatively plead that each did not exist. There

is no principle in law or logic to justify placing that burden on a plaintiff.

It is true there are times when the plaintiff in proving his affirmative case will necessarily have to negative any good faith defense. If a police officer arrests a citizen and the charges are later dismissed, the police officer may be sued for a Fourth Amendment-false arrest violation. In proving that there was no probable cause for the arrest, the plaintiff is also proving that the police officer acted unreasonably. As Judge Jon O. Newman has explained:

> ...[T]he victim's cause of action for an arrest in violation of his Fourth Amendment rights requires an arrest without probable cause. To make out his case, the plaintiff must establish that a reasonably prudent police officer, under all the circumstances, would not have had probable cause to believe that he had committed a crime. Then, under Bivens, the officer still has a defense if he acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on probable cause, what does the defense mean? Surely the officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.

Newman, "Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct," 87 Yale L. J. 447, 460 (1978).

Even in this area, the policeman's claim of probable cause may come from unknown informants or other facts of which only he could be aware. A policeman sued for an improper search may rely upon consent from a person with a joint possessory interest, see Meiners v. Moriarty, 563 F.2d 343, 349 (7th Cir. 1977). If an entry is made into the home without a warrant, the police officer may have believed there was a fleeing felon therein, see Williams v. Gould, 486 F.2d 547, 548 (9th Cir. 1973). It is impossible to catalogue all the ways in which a police officer may prove that his arrest or search was reasonable if the victim is later cleared of the charges. And it would be an impossible burden for the victim--after he has proved the violation--to anticipate every calculation that went into the officer's decision and to show that his conclusion was improper. Accordingly, the burden of proving good faith in the special sense of Fourth Amendment reasonableness, or probable cause, has always been imposed on defendants in §1983 suits alleging Fourth Amendment violations. See, e.g., Pierson v. Ray, supra, 386 U.S. at 555-557.

D. In Non-Section 1983 Cases, the Person Asserting a Good Faith Defense Has the Burden of Pleading and Proving it.

A good faith defense is not confined to cases involving constitutional torts. In many other areas of the law, a person may seek to avoid liability because of his good faith. It is almost uniformly the rule that the person whose good faith is at issue must himself allege and prove that defense.

By statute, for example, Congress has determined that a person accused of violating Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a), has the burden of proving that his lower price was a response to an equally low price of a competitor as provided for in Section 2(b). "...[N]othing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price...was made in good faith to meet an equally low price of a competitor...." See United States v. United States Gypsum Co., 438 U.S. 422, 450 (1978); F.T.C. v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945) ("... Section 2(b)...does place upon the seller the burden of showing that the price was made in good faith to meet a competitor's....")

In shareholder derivative suits, corporate directors must prove their good faith when corporate payments are made to them. "[W]here the directors have a personal interest in the application of the corporate payments, such as where they are fixing their own compensation, the business judgment rule no longer applies and the burden shifts to the directors to demonstrate affirmatively that the transactions were engaged in with good faith and were fair...." Cohen v. Ayers, 596 F.2d 733, 739-40 (7th Cir. 1979).

The rule is the same in certain areas of labor law. Thus under the Fair Labor Standards Act an employer is liable for heavy liquidated damages if he pays less than the minimum wage. He has a defense, however, if he proves his good faith belief that the law did not apply to him. The Fifth Circuit recently explained: "We understand the language of Section 11 of the Portal to Portal Act to impose upon the employer who would escape the payment of liquidated damages a plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compensatory

verdict." Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468 (5th Cir. 1979).

Similarly, although taxpayers are in certain circumstances relieved of penalties for failure to file tax returns, penalties are imposed simply upon a showing of failure to file; the burden is on the taxpayer to plead and prove a good faith defense. See, e.g., United States v. Kroll, 547 F.2d 393 (7th Cir. 1977).

In these areas, the person asserting the defense of good faith is in the best position to know factually and legally on what factors his good faith was based. Thus, the law imposes on him the obligation to introduce the defense and allege the facts that show its existence. The rule should be the same in cases brought under Section 1983.

CONCLUSION

For the reasons stated above, amicus respectfully requests that the judgment of the First Circuit dismissing the complaint be reversed.

Respectfully submitted,

LEON FRIEDMAN
Hofstra Law School
Hempstead, N.Y. 11550

CHARLES S. SIMS
BRUCE J. ENNIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, N.Y. 10016

Attorneys for Amicus Curiae

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